2007

Gene Decker v. Nannette Rolfe : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GENE DECKER.	:	
Petitioner/Appellant,	:	
v.	:	Case No. 20070210-CA
NANNETTE ROLFE, Bureau Chief Driver Control Bureau, Driver License Division, Department of Public Safety, State of Utah,	:	
Respondent/Appellee.	:	

Appeal from the Final Judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, Honorable Timothy R. Hanson, Presiding

BRIEF OF APPELLEE

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ORAL ARGUMENT REQUESTED BY RESPONDENT/APPELLEE

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is taken from the Findings of Fact, Conclusions of Law and Order of the Third Judicial District Court in and for Salt Lake County, State of Utah, affirming the administrative revocation of petitioner's driver license for refusal to submit to a chemical test for alcohol or drugs under Utah Code Ann. § 41-6a-520 (West Supp. 2006).[1] Rather than requesting a hearing under Utah Code Ann. § 63-46b-13 (West 2004), petitioner filed a petition for judicial review pursuant to Utah Code Ann. § 53-3-224 (West 2004).

[1]While the Notice of Intent to Deny, Suspend, Revoke, or Disqualify cites to Utah Code Ann. § 41-6-44.10, that provision was renumbered effective February 2, 2005. The provisions of the revised statute control this case.

On February 9, 2007, the district court entered a final order concluding that petitioner's refusal to submit to a chemical test was informed and voluntary and affirming the revocation (R. 58-62). Petitioner filed a timely notice of appeal on March 5, 2007 (R. 64-65). Utah Code Ann. § 78-2a-3(2)(a) (West 2004) gives this Court appellate jurisdiction over the district court's review of the Driver License Division's informal adjudicative proceedings.

ISSUES PRESENTED UPON APPEAL

1. The district court lacked jurisdiction to review the administrative revocation of petitioner's driver license because petitioner failed to exhaust his administrative remedies before seeking trial *de novo*.

Standard of Review: "The determination of whether a court has subject matter jurisdiction is a question of law, which we review for correctness, according no deference to the district court's determination." *Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147. Moreover, "'[w]hen a matter is outside the court's jurisdiction it retains only the authority to dismiss the action.'" *Maverik Country Stores, Inc. v. Indus. Comm'n of Utah*, 860 P.2d 944, 947 (Utah App. 1993) (quoting *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989).

2. The district court correctly concluded that, in light of the arresting deputy's thorough explanations of the consequences of refusal, petitioner's refusal to submit to chemical testing was not rendered involuntary by the deputy's comments regarding whether he would personally submit to such testing.

Standard of Review: In a driver license revocation proceeding, this Court's review of the trial court's determination on trial *de novo* "is deferential to the trial court's view of the evidence unless the trial court has misapplied principles of law or its findings are clearly against the weight of the evidence." *Lopez v. Schwendiman*, 720 P.2d 778, 780 (Utah 1986).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issues before the Court is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case, course of Proceedings, and Disposition Below

Petitioner was arrested on May 21, 2006, for driving under the influence of alcohol and was given a copy of the summons and citation (R. 33), which advised him of his right to make a written request for an administrative hearing within ten calendar days. He failed to make a timely request, but did submit a belated request on June 5, 2006 (Add. A), which the Division rejected as untimely (Add. B). Based on petitioner's refusal to submit to a chemical test on a second or subsequent alcohol arrest, after being requested and warned of the results by a peace officer, his license was suspended for a period of 24 months, effective June 20, 2006, by order dated June 14, 2006 (Add. C).[2]

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[2]The documents contained in Addenda A - C were filed in the course of the administrative proceedings underlying this case. The Court can take judicial notice of the record of this administrative proceeding. *See Moore v. Utah Tech. Coll.*, 727 P.2d 634, 639 n.17 (Utah 1986) (taking judicial notice of administrative rules and regulations as well as published

The June 14, 2006 order advised petitioner that he could make a written request for reconsideration within twenty days of the effective date under Utah Code Ann. § 63-46b-13, and that if the request was denied, he could appeal to the district court under Utah Code Ann. § 53-3-224. Petitioner chose not to seek reconsideration. On July 12, 2006, he filed a Petition for Judicial Review Pursuant to Utah Code Ann. § 53-3-224 (R. 1-4), which governs review of informal adjudicative proceedings cancelling, suspending, or revoking driver licenses.[3] Following trial de novo in the district court and post-trial briefing, the judge entered an order on February 9, 2007, denying the petition and upholding the revocation of petitioner's license (R. 58-62). This appeal ensued.

B. Statement of Relevant Facts

"'I had four beers, and I screwed up. I'm just glad that I didn't kill my nephew, Calvin.'" R. 53 at 7:23-25; *see also* R. 59 at ¶ 1. These were petitioner's words to Deputy

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accounts of administrative proceedings and actions).

[3]Nothing in this provision excuses petitioner from compliance with the requirements of the Administrative Procedures Act. Under Utah Code Ann. § 63-46b-1(1) (West Supp. 2006),

> Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state and govern: (a) state agency action that determines the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and (b) judicial review of the action.

Utah Code Ann. § 53-3-224 contains no reference to Title 63, Chapter 46(b), and none of the subsection (2) exceptions applies to driver license revocations.

Steve Marshall, who had been dispatched to the site of petitioner's overturned truck in Butterfield Canyon on the afternoon of May 21, 2006. R.53 at 4:18 - 5:3; R. 59 at ¶ 1. As soon as he stepped out of his vehicle, Deputy Marshall had detected the odor of alcohol, and as he approached petitioner, he could smell it coming from petitioner's person. R. 53 at 5:23 - 6:3; R. 59 at ¶ 1. Petitioner admitted being the driver of the truck. R. 53 at 6:5-6; R. 59 at ¶ 1. After medical personnel examined petitioner and released him to the deputy, R. 53 at 6:14-19, Deputy Marshall administered a series of field sobriety tests. R. 53 at 8:1-4; R. 59 at ¶ 3. The deputy observed that in the horizontal gaze nystagmus test, petitioner's eyes lacked smooth pursuit and showed onset of nystagmus at approximately 40 degrees. R. 53 at 9:1-9; R. 59 at ¶ 3. During the one-leg stand test, petitioner was unable to keep his leg raised for more than a count of two. R. 53 at 10:5-25; R. 59 at ¶ 3. Petitioner was unable to walk straight, touch heel to toe, or complete the nine-step walk-and-turn test, but stopped at step eight. R. 53 at 11:1-9; R. 59 at ¶ 3. The deputy further observed that petitioner's speech was slow and his balance was poor. R. 53 at 11:21-25; R. 59 at ¶ 2.

Based on petitioner's admissions, the results of the field sobriety tests, and the deputy's observations, Deputy Marshall arrested petitioner and transported him to the Special Operations Division of the Salt Lake County Sheriff's Office. R. 53 at 12:18-24; R. 9 at ¶ 4. During transport, which took approximately one hour, petitioner repeatedly pressed the deputy for his opinion on whether the deputy would take a breath test under similar circumstances. R. 53 at 13:2-15; R. 59-60 at ¶¶ 4-5. Deputy Marshall initially

refused to respond to these questions, R. 53 at 13:16-25, but ultimately stated that "I, personally, would not submit to a chemical test." R. 53 at 14:7-8; *see also* R. 60 at ¶ 5. However, he also explained numerous times the consequences of not taking the test. R. 53 at 55:6 - 61:11; R. 60 at ¶ 5. On arrival at the Special Operations Division, Deputy Marshall informed petitioner he was under arrest for driving under the influence, requested him to take a chemical test, and read him the refusal admonitions verbatim, explaining in detail what would happen if he declined to take the test. R. 53 at 14:9 - 17:17; R. 60 at ¶¶ 6-7. When asked to submit to the test, petitioner responded, "'Well, I took no drugs, and I refuse the test.'" R. 53 at 15:10; R. 60 at ¶ 6. At no time did he indicate a willingness to take the test. R. 53 at 17:15-17; R. 60 at ¶ 7. Deputy Marshall then served petitioner with a copy of the Driver License Division's notice of intent to suspend or revoke his license. R. 53 at 18:3-15; R. 60 at ¶ 8.

SUMMARY OF ARGUMENT

Because petitioner failed to exhaust his administrative remedies before seeking trial *de novo* in the district court, the district court lacked jurisdiction over the merits of his case and its order is therefore void. Consequently, this Court has jurisdiction only to determine whether the Driver License Division correctly determined that petitioner's request for an administrative hearing was untimely, thereby depriving the district court of jurisdiction over the merits based on failure to exhaust. If the Court concludes that the district court lacked jurisdiction to review the revocation *de novo*, its decision must be vacated and the appeal dismissed.

The test for intent to refuse a chemical test for alcohol is an objective one, as established in *Holman v. Cox*, 598 P.2d 1331, 1333 (Utah 1979). The test is satisfied if the driver's actual behavior, judged objectively, shows that he intended to refuse. Petitioner has cited to no objective evidence of behavior demonstrating either that he intended to take the test or that he was ambivalent with regard to taking it. His claimed, after-the-fact reliance on Deputy Marshall's personal opinion--especially in light of his assurances at the time of the conversation that he was not seeking advice and would consider all information in making his choice--cannot satisfy the objective test established by precedent. Based on the substantial evidence of record, the district court did not err in finding that petitioner's refusal to submit to chemical testing was informed and voluntary and in sustaining the administrative revocation of his driver license.

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE PETITIONER FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

Utah Code Ann. § 63-46b-14 permits parties to administrative actions to seek judicial review unless review is expressly prohibited by statute. Under subsection (2) of the statute,

> A party may seek judicial review only after exhausting all administrative remedies available, except that:
> (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;
> (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:
> (i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Utah Code Ann. § 63-46b-14(2) (West 2004).

Petitioner brought his petition for judicial review pursuant to Utah Code Ann. § 53-3-224 (West 2004), which states, in relevant part, that "[a] person denied a license or whose license has been cancelled, suspended, or revoked by the division may seek judicial review of the division's order." Nothing in either that statute or the Administrative Procedures Act (UAPA), Utah Code Ann. §§ 63-46b-1 through -23, exempts petitioner from exhausting his administrative remedies. Consequently, because petitioner failed to file a timely, written request for administrative hearing within ten days of the Division's notice of intent to revoke his license, the district court should have dismissed the case for lack of subject matter jurisdiction. Nothing in petitioner's subsequent actions cures this fatal jurisdictional defect.[4]

The district court did not question its jurisdiction in this case, nor did any of its findings of fact or conclusions of law relate to the question of jurisdiction. However, "[q]uestions of subject matter jurisdiction, because they are threshold issues, may be raised at any time and are addressed before resolving other claims." *State v. Sun Sur. Ins.*

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[4]To the extent that section 53-3-224 permits judicial review by the district court, that review is limited to the correctness of the division's denial of petitioner's request for hearing as untimely. *See* Add. C ("If the division denies the request [for reconsideration of evidence presented at administrative hearing], the petitioner may appeal to the District Court, in the county of the incident, in compliance with UCA 53-3-224."). The division lacks power to enlarge the district court's statutory jurisdiction to review the merits contrary to UAPA's explicit requirement to exhaust administrative remedies.

Co., 2004 UT 74, ¶ 7, 99 P.3d 818; *see also Hous. Auth. of Salt Lake v. Snyder*, 2002 UT 28, ¶ 11, 44 P.3d 724. Because the district court lacked jurisdiction, it was without authority to address the merits of petitioner's claims. *See Snyder*, 2002 UT 28 at ¶ 11.

In the letter denying the untimely request for a hearing, defendant stated, "You may appeal this action in the district court in the county in which the offense occurred within thirty (30) days of the effective date of your suspension." Add. B. The effective date of suspension was June 20, 2006, and petitioner filed his notice of appeal on July 12, 2006, within the 30-day period described in the letter. This statement does not, however, entitle petitioner to de novo review on the merits of his suspension. As this Court observed in *Bonded Bicycle Couriers v. Department of Employment Security*, 844 P.2d 358, 360 (Utah App. 1992), "the agency has no authority to enlarge the appellate jurisdiction of this court." The statement fails to meet the exemption criteria of section 63-46b-14. It is not a statutory waiver of exhaustion as specified in subsection 14(a). It does nothing to demonstrate that the administrative hearing would have been an inadequate remedy under subsection 14(b)(i), or to show that the exhaustion of administrative remedies would have resulted in irreparable and disproportionate harm to petitioner under subsection 14(b)(ii). To the contrary, had petitioner made a timely request for an administrative hearing, he would have had an earlier opportunity to air the merits of his suspension and to obtain any relief warranted.

As explained by this Court, "[t]he basic purpose underlying the doctrine of exhaustion of administrative remedies 'is to allow an administrative agency to perform

functions within its special competence--to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.'" *Maverik Country Stores*, 860 P.2d at 947 (quoting *Parisi v. Davidson*, 405 U.S. 34, 37 (1972)). By failing to seek an administrative hearing within ten days of receiving notice of the Division's intent to revoke his license, petitioner deprived the Division of the opportunity to examine the facts on the record for error and apply its expertise to make any appropriate corrections. Under the plain language of UAPA, this failure divested the district court of jurisdiction to review the matter *de novo*, and it was without authority to do anything except dismiss the case. Likewise, this Court cannot reach the merits of petitioner's appeal, but has authority only to vacate the district court's decision and dismiss the present appeal.

The jurisdictional issue in this case is not one of first impression; the Court previously considered a similar argument in an unpublished opinion, *Morgan v. Blackstock*, 1999 UT App 162, 1999 WL 33244737, and concluded that because "no statute *requires* a hearing to be held as a prerequisite to judicial review[,]" exhaustion is not required. *Morgan*, 1999 UT App 162 at *1. As support for this position, the Court cited only to the language from Utah Code Ann. § 63-46b-14(2) excusing exhaustion for informal administrative proceedings "when 'this chapter or any other statute states that exhaustion is not required.'" *Id.* Disposing of the issue in a single paragraph, the Court provided no further explanation for its decision. The language cited by the Court, excusing exhaustion only where a specific statute explicitly states that exhaustion is not

required, is at odds with the result in *Morgan*, which appears to demand the opposite: an affirmative statutory statement explicitly requiring exhaustion. *Morgan*'s interpretation is in conflict with both the statute's plain language and its underlying purpose.

Morgan was issued in 1999 as an unpublished, *per curiam* memorandum decision of this Court. At that time, unpublished decisions did not receive the close scrutiny and detailed treatment applied to the Court's published opinions and, consequently, were not citable as precedent. In fact, at the time *Morgan* was issued, Rule 4-508(1) of the Utah Rules of Judicial Administration recognized the weaknesses inherent in unpublished opinions by prohibiting their citation: "Unpublished opinions, orders and judgments have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel." Rule 4-508 was not repealed until November 1, 2003. A Westlaw search reveals that *Morgan* has never been cited in another opinion in Utah or any other jurisdiction.

The Utah Supreme Court examined the use of unpublished opinions in *Grand County v. Rogers*, 2002 UT 25, 44 P.3d 734. Acknowledging that "the court of appeals is often faced with novel legal issues, cases that require the interpretation of statutory law for the first time, and cases of broad interest in the legal community[,]" 2002 UT 25 at ¶ 11, the supreme court declared that "when the reasoning is new, or novel, or has not previously been applied to a matter of the type on appeal, a memorandum decision is inappropriate." *Id.* at ¶ 14. The court emphasized that "[i]n the case of a statute, care

should be used to ensure that first impression analysis of a statute, or unique application of a statute, be delivered in an opinion, not a memorandum decision." *Id.* at ¶ 14 n.3.

Prior to *Morgan*, no Utah case had reached the issue of whether a failure to exhaust administrative remedies under UAPA foreclosed district court review of informal administrative proceedings resulting in revocation of driver licenses. Nonetheless, the *Morgan* court disposed of the issue without extensive analysis in an unpublished memorandum decision, reflecting precisely the problems later recognized in *Grand County*. Under these circumstances, *Morgan*'s scant analysis warrants reexamination here.

The continuing vitality of *Morgan* is cast in additional doubt by *Gilley v. Blackstock*, 2002 UT App 414, 61 P.3d 305. Gilley's driver license, like petitioner's, was revoked following her refusal to submit to a chemical test after police suspected her of driving under the influence of alcohol. No statutory revocation hearing was held, but an order revoking the license was issued on February 5, 2001. Nearly three months later, Gilley appealed the revocation to the district court, which dismissed the appeal as untimely. Affirming the dismissal, this Court observed that "although the district court has general jurisdiction to review agency adjudicative proceedings, the district court must 'comply with the requirements' of the UAPA . . .[,]" including those affecting time limits. *Gilley*, 2002 UT App 414 at ¶ 5 n.1 (citation omitted). The necessity to exhaust administrative remedies is no less a part of UAPA's requirements than the time limits at issue in *Gilley*, and there is no basis for excusing compliance with one while requiring

compliance with the other. *See Kunz & Co. v. State*, 913 P.2d 765, 770 (Utah App. 1996) (holding that a statute giving district courts jurisdiction to review, by trial *de novo*, final orders from the Department of Transportation's adjudicative proceedings regarding outdoor advertising does not excuse administrative exhaustion under section 63-46b-14(2). The *Kunz* Court termed as "disingenuous" the plaintiff's argument that the statute, which did not relieve the plaintiff of the exhaustion requirement, permitted the plaintiff to proceed directly to the district court for relief.)

Recent legislation also supports a requirement that administrative remedies must be exhausted before a driver whose license has been administratively revoked may have recourse to judicial review. Effective April 30, 2007, Utah Code Ann. § 41-6a-521(6)(a) was amended to read, "Any person whose license has been revoked by the Driver License Division under this section *following an administrative hearing* may seek judicial review." *See* S.B. 4, 2007 Gen. Sess. (Utah 2007) (emphasis added). While the phrase "following an administrative hearing" adds nothing to the requirements already existing under UAPA, it does clarify the need to request an administrative hearing before proceeding to the district court for review by trial *de novo*. Such clarifications, which neither enlarge nor curtail vested interests, have long been held retroactive in application. *See Foil v. Ballinger*, 601 P.2d 144, 151 (Utah 1979); *Okland Constr. Co. v. Indus. Comm'n of Utah*, 520 P.2d 208, 210-11 (Utah 1974).

Stare decisis does not preclude the Court from reaching a conclusion contrary to *Morgan*. In *State v. Menzies*, the Utah Supreme Court explained that the doctrine

comprises two facets: vertical *stare decisis*, which obligates lower courts to follow the holdings of a higher court, and horizontal *stare decisis*, which requires a court of appeals to follow its own prior decisions and, in appellate courts that sit in panels, the prior decisions of other panels. The court further explained that

> [h]orizontal stare decisis does not, however, require that a panel adhere to its own or another panel's prior decisions with the same inflexibility as does vertical stare decisis. Instead, although it may not do so lightly, a panel may overrule its own or another panel's decision where "the decision is clearly erroneous or conditions have changed so as to render the prior decision inapplicable."

State v. Menzies, 889 P.2d 393, 399 n.3 (Utah 1994) (quoting *State v. Dungan*, 149 Ariz. 357, 361, 718 P.2d 1010, 1014 (1986)) (citations omitted). Respondent submits that the plain language of section 63-46b-14(2) and the legislative clarification of section 41-6a-521(6)(a)'s exhaustion requirement render this case suited to the Court's exercise of its power to overrule the prior decision of another panel. Respondent urges the Court to conclude that, under the statute, petitioner's failure to exhaust his administrative remedies foreclosed district court review of the revocation of his driver license.

II. THE OBJECTIVE EVIDENCE OF PETITIONER'S CONDUCT SHOWS THAT THE DISTRICT COURT PROPERLY FOUND HIS REFUSAL TO TAKE THE CHEMICAL TEST VOLUNTARY.

"The determination that plaintiff's failure . . . to take the [blood alcohol content] test amounts to a refusal is a factual finding which we will not disturb when supported by substantial evidence." *Lee v. Schwendiman*, 722 P.2d 766, 767 (Utah 1986). Moreover, "[n]ecessarily that judgment must be made under an objective standard." *Beck v. Cox*,

597 P.2d 1335, 1339 (Utah 1979). Petitioner's sole argument in the district court was that, contrary to his objective conduct, he was incapable of refusing because of his subjective reliance on Deputy Marshall's answer to petitioner's question whether the deputy, in similar circumstances, would personally submit to the test. Given the deputy's repeated warnings regarding the result of refusal--including a verbatim reading of the admonitions from the DUI report form--and petitioner's clear statement of refusal subsequent to those warnings, there is substantial evidentiary support for the district court's finding of refusal and for affirmance of that finding on appeal.

None of the cases cited by petitioner supports a different outcome. Petitioner's citation to *Mills v. Swanson*, 93 Idaho 279, 460 P.2d 704 (1969), is easily distinguishable on the basis that the arrestee in *Mills* was in a dazed state when requested to submit to testing, as the Utah Supreme Court observed in *Beck*. *See Beck*, 597 P.2d at 1339. Petitioner points to no evidence that he was dazed or otherwise unable to comprehend the warnings he was given regarding the results of refusing the test; in fact, the evidence points to the contrary. His situation is, in fact, more closely analogous to the arrestee in *Beck*, whose

> self-serving testimony at the hearing that he did not intend to refuse a test and his statement at the booking desk to the effect that he had not taken a test hardly militate against the message conveyed by the totality of his conduct in the presence of the police officer.

Id. at 1337. Beck had declined to give a yes or no answer to each of the officer's requests over a 30- to 40-minute period that he submit to testing, and finally refused to reply

altogether. Although Beck's conduct was arguably more ambiguous than petitioner's in the present case, the supreme court held that Beck's actions "constituted a refusal to take the test[,]" and affirmed the district court's finding of refusal as supported by substantial, competent evidence. *Id.* As the court observed, "[t]he unavoidable fact is that the appellant in this case, under any realistic appraisal of the facts, refused by his actions to take a blood test and simply played verbal games with the officer to avoid a direct refusal." *Id.* at 1338.

Here, the testimony adduced in the district court shows that any cloud over the voluntariness of petitioner's refusal arose from the verbal games in which he engaged Deputy Marshall. The transcript of the district court proceeding reveals the following exchange:

> Q. Did he ask you any questions regarding the breath test?
> A. Yes.
> Q. What did he ask?
> A. He asked several times over and over as we were going down Butterfield Canyon what my personal opinion was; what I personally would do if I was in his situation.
> Q. Regarding what?
> A. Regarding cooperating, taking chemical tests, how to bail out of jail, whether he did or didn't need a lawyer.
> Q. And did you respond to those questions?
> A. I initially would not respond to him for quite some time. I would tell him, "You know, Gene, you know, you're a nice guy, but I can't -- I probably shouldn't give you answers to these questions, because it could be considered that I would be giving you advice," and he responded to me, "No, this isn't advice. This is just your own personal opinion on what you personally would do."
> I continued to hesitate to give him the answers to these questions. Finally, he continued to say that "This is between you and me, and just between two men; and I will consider all of the aspects of what you -- of the

> information you give me in making up my own mind." So I did tell him what my personal opinion would be, as to submitting to a chemical test."

R. 53 at 13:6 - 14:5. Nonetheless, once at the station, Deputy Marshall read petitioner the admonitions regarding the chemical tests, exactly as written, from the DUI report form after advising him that he was under arrest for driving under the influence of alcohol and/or drugs, and requested that he take a breath test. R. 53 at 14:9 - 15:7. Petitioner responded, "'Well, I took no drugs, and I refuse the test.'" R. 53 at 15:10. In addition to reading the admonitions, Deputy Marshall testified that he "gave him all aspects, including my own opinion; and if he didn't do that, what would happen." R. 53 at 15:14-16. That information included

> [i]f he did take the breath test what would happen; if he didn't take the breath test what would happen. All of the different aspects to make sure he had the ability to make up his own mind on what he decided that he wanted to do. I also made sure that he knew that what I -- the information that I gave him was not legal advice in any way, shape, or form. It was just my own personal opinion that he asked for.

R. 53 at 15:18-24. As in *Beck*, under an objective standard, "there can be no question that the plaintiff was adequately informed and that any reasonable person would have understood" the results of refusing consent to the test. *Beck*, 597 P.2d at 1339. As in *Beck*, "the officer did all that was required of him, and the trial court's conclusions are adequately supported by the evidence and its order of revocation decided under a proper legal standard." *Id.* *Beck* is of no assistance to petitioner.

Neither *Holman v. Cox*, 598 P.2d 1331 (Utah 1979), nor *Muir v. Cox*, 611 P.2d 384 (Utah 1980), requires a different result. In each case, the plaintiff's driver license was

revoked following refusal to submit to a chemical test for alcohol. Also in each case, the plaintiff was warned at the time of arrest, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), that he had the right to remain silent, that his statements could be used against him, and that he had the right to the presence of an attorney. While the supreme court concluded that the *Miranda* warning and the refusal admonitions were not incompatible, it remanded both cases for factual findings as to the clarity with which the respective plaintiffs had been instructed as to their obligations and rights.

The present appeal does not suffer from the absence of findings that required remand in *Holman* and *Muir*. Based on the testimony, the district court found that although "Deputy Marshall told Petitioner that personally he would not take the test[,]" he also "explained to Petitioner the consequences if he refused to take the test numerous times." R. 60 at ¶ 5. On the basis of the testimony, the court concluded that

> Petitioner refuse[d] the requested breath test after being informed of the consequences of the refusal. Deputy Marshall properly read the admonitions, then he went above and beyond in his explanations of the consequences included in the admonitions. Deputy Marshall's statements regarding his personal opinion did not have any legal effect on Petitioner's refusal to take the breath test. The pivotal fact in this case is that while Deputy Marshall may have voice[d] certain personal opinions about taking the breath test himself, he also emphasized the consequences to the Petitioner if he refused to take the test. Based on the testimony presented at trial, Petitioner clearly made an informed and voluntary decision not to take the breath test.

R. 61 at ¶ 2.

The cases involving *Miranda* warnings are inapposite for an additional reason. Unlike the present appeal, they involve potential confusion between two legal standards:

the rights represented by *Miranda* and the responsibilities imposed by implied consent. Here, there is no competing legal standard potentially confusing petitioner as to the legal result of failure to submit to chemical testing.

By invoking the *Miranda* rights cases, petitioner attempts to elevate his claim to constitutional dimensions. Scrutiny of the language he offers in support of this proposition does not establish the "Fifth Amendment connection" (Aplt. Brief at 9) he propounds. His reference to *South Dakota v. Neville*, 459 U.S. 553 (1983) illustrates the problem. He quotes *Neville*'s citation to the caution in *Schmerber v. California* "that the Fifth Amendment may bar the use of testimony obtained when the proffered alternative was to submit to a test so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession.'" *Neville*, 459 U.S. at 563 (quoting *Schmerber v. California*, 384 U.S. 757, 765 n.9 (1966)); *see* Aplt. Brief at 9. However, he overlooks the *Neville* court's explicit rejection of the notion that submission to a blood-alcohol test was akin to such procedures: "In contrast to these prohibited choices, the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him." *Id.* The court referred to the test as "so safe, painless, and commonplace" as not to raise issues of unconstitutional compulsion, *id.*, likening it "to a police request to submit to fingerprinting or photography." *Id.* at 564 n.15. The court held "that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act

coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.* at 564. Petitioner's asserted constitutional connection fails.

Petitioner's reliance on *Hampel v. State*, 706 P.2d 1173 (Alaska App. 1985), is equally unavailing. At the most fundamental level, *Hampel*'s *Miranda* analysis is inapposite because it deals with a Fifth Amendment issue not implicated by refusal to take a chemical test, as the Supreme Court ruled in *Neville*. Moreover, *Hampel* addresses an ambiguous request for counsel; by contrast, there was nothing ambiguous about petitioner's refusal to submit to chemical testing, viewed objectively, as required by precedent. Petitioner's implication that this Court approved *Hampel*'s reasoning in *State v. Sampson*, 808 P.2d 1100 (Utah App. 1991) (*see* Aplt. Brief at 10), overstates the Court's use of the *Hampel* decision. *Sampson* cites to *Hampel* only twice. The first reference, consisting of less than one sentence and contained in a string citation, quotes language the *Hampel* court found constituted an equivocal request for counsel. *See Sampson*, 808 P.2d at 1109. The second citation, contained in a footnote and also less than one sentence, deals with clarification of Hampel's ambiguous request. *See id.* at 1111 n.18. Clarification of an ambiguous request for counsel in a criminal case under a Fifth Amendment standard not implicated in refusal of chemical testing in administrative revocation actions is too far afield from the present appeal to be of probative value. But even taking at face value petitioner's extended quotation of the Alaska court of appeals' language in *Hampel*, it does not suggest that Deputy Marshall's response to petitioner's direct question is, as a matter of law, inappropriate. As the Alaska court emphasized,

"Nothing in our opinion is intended to suggest that an interrogating officer would commit any impropriety or otherwise be precluded from answering a question by the accused directly calling for a response containing substantive information likely to discourage" the exercise of a legal right. *Hampel*, 706 P.2d at 1181 n.7. Here, Deputy Marshall did nothing to encourage petitioner to forgo a legal right; instead, his response to petitioner's direct and persistent questioning informed petitioner of his full range of options, including the result of refusing to be tested.

It is notable that petitioner does not challenge any of the district court's findings regarding the numerous warnings Deputy Marshall gave him about the results of refusing the chemical test. He does not point to objective evidence of his conduct casting doubt on the fact of his refusal. As in *Beck*, "[a]pplying an objective standard to whether plaintiff understood the consequences of his actions, there can be no question that the plaintiff was adequately informed and that any reasonable person would have understood." *Beck*, 597 P.2d at 1339. Like Beck's, petitioner's self-serving testimony placing subjective reliance on Deputy Marshall's personal opinion in refusing to take the test (*see* R. 53 at 70:2-15) is belied by his objective conduct as well as by the substantial evidence of record. The district court did not err in concluding that petitioner's refusal, objectively viewed, was informed and voluntary, and its decision warrants affirmance on this ground.

CONCLUSION

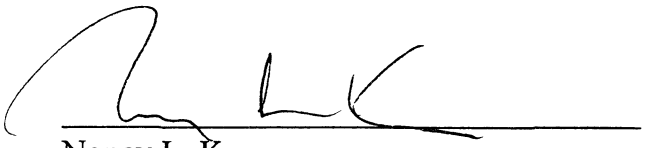
For these reasons, as more fully explained above, defendant respectfully requests the Court to vacate the decision of the district court and to dismiss this appeal or, should

the Court conclude that jurisdiction is appropriate, to affirm the district court's decision sustaining the revocation of petitioner's driver license.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes that the need for clarification of the appropriate statutory process for judicial review of administrative actions revoking, suspending, denying, or disqualifying driving privileges necessitates oral argument in this case.

Dated this 7th day of August, 2007.



Nancy L. Kemp
Assistant Attorney General
Attorney for Respondent/Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of August, 2007, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLEE to the following:

Jason Schatz
Schatz, Anderson & Uday, L.L.C.
57 West 200 South, Suite 200
Salt Lake City, Utah 84101

Shayla Sapkota

ADDENDUM A

964-4499

June 5 2006

Driver's License Division
P.O. Box 30560
Salt Lake City UT
84130

Attn: John Fairbanks
D.U.I Department

Re: Gene D. Decker
8630 W. Equinox Cir.
Cappeeton UT
84006
563-0267

I am respect fully requesting your consideration to grant me a hearing re: re-instating my Utah driver's license. I was advised on Friday, evening, June 2, 2006, by Steve Marshall of the Salt Lake County Sheriff's office that such a hearing can be held within 10 days of an official taking possession of your driver's license (mine was taken on Sunday, May 21, 2006). I was not aware this is possible and as of this date have not received a letter in the mail advising me this was possible. As the ten days have expired since my license was taken I am asking for your consideration in this matter.

Respect fully submitted

Gene Decker

ADDENDUM B

Jon M. Huntsman Jr
Governor

Robert L. Flowers
Commissioner

State of Utah

DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSE DIVISION

06-08-06

Nannette Rolfe
Director

P.O. Box 30560
Salt Lake City, Utah 84130-0560
(801) 965-4437

GENE D DECKER
8630 W EQUINOX CIR
COPPERTON UT 84006

File: 14676805
Arrest Date: 05-21-06
DOB: 12-10-62

Dear Driver:

Recently, you were arrested for Driving Under the Influence and were served with a notice of this Department's intention to deny, suspend, revoke or disqualify your Utah driving privilege as a result. In that notice you were informed that you have the right to request in writing a hearing on this intended suspension. The notice specified that your WRITTEN REQUEST must be sent to the Department WITHIN TEN (10) DAYS of the date of arrest. (Utah Code Annotated 41 and 53.)

Request Date: 06-05-06 Fax Date: 06-05-06

The Department has received your written request for a hearing in this matter. However, the evidence on your letter indicates that the request was not submitted within the statutorily mandated 10-day period. Therefore, the Department must deny your request for an administrative hearing on this matter. The suspension of your Utah driving privilege will automatically take place on the 30th day after the date of your arrest.

You may appeal this action in the district court in the county in which the offense occurred within thirty (30) days of the effective date of your suspension.

Respectfully,

Nannette Rolfe, Director
Driver License Division

LR
D906
RQ4H

ADDENDUM C

Jon M. Huntsman, Jr.
Governor
Robert L. Flowers
Commissioner

State of Utah
DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSE DIVISION

Nannette Rolfe
Director

P.O. Box 30560
Salt Lake City, Utah 84130-0560
(801) 965-4437

CERTIFICATE OF MAILING
I certify below, as an employee of the Drivers License Division, Utah State Department of Public Safety, I deposited the United States Mail, Salt Lake City, Utah, the original order, of which this is an exact copy, in an envelope with postage stamp and address to the person named in the order, at his or her last address as shown by the records of the Department
Date 14 Jun 2006
Employee of Department: JR

Date of Arrest: 21 May 2006
Date of Birth: 10 Dec 1962
License/File Number: 14676805
Date: 14 Jun 2006
This Order is Effective
12:01 AM on 20 Jun 2006

GENE DALE DECKER
8630 W ENQUINOX CIR
COPPERTON UT 84006

As a result of refusal to submit to a chemical test on a second or subsequent alcohol arrest while driving a motor vehicle, a motorboat or an off-highway vehicle, your driving privilege is revoked for a period of twenty-four (24) months effective 20 Jun 2006. The basis for this action is the hearing officer's findings of fact and conclusion that you refused to submit to a chemical test after being requested and warned by a peace officer, or you failed to request a hearing, or you failed to appear for the hearing, contrary to Utah Code Annotated 41-6-44.10, renumbered to 41-6a-521, or the implied consent law of another state.

This action is in accordance with Titles 41 and 53 Utah Code Annotated, 1953. This notice does not replace any prior notice already in effect.

IMPORTANT INFORMATION - PLEASE READ

When your driving privilege has been revoked for an alcohol violation **you must discontinue driving** all motor vehicles. It is a misdemeanor to operate any motor vehicle upon the highways of this state until the sanction period is over and you have reinstated and obtained a valid driving privilege. **Effective immediately**, driving with a measurable or detectable amount of alcohol in the body is a violation of UCA 41-6a-530 and may result in an additional 1-year period of revocation.

In compliance with UCA 63-46b-13, a written request for reconsideration of the evidence presented at the administrative hearing may be filed with the Driver License Division, within twenty (20) days of the effective date of this notice. If the division denies the request, the petitioner may appeal to the District Court, in the county of the incident, in compliance with UCA 53-3-224.

WHEN YOU ARE ELIGIBLE TO REINSTATE YOUR DRIVING PRIVILEGE, YOU MUST COMPLY WITH THE FOLLOWING:

- Pay a $50.00 reinstatement fee. Pay an administrative fee of $150.00. Other fees may apply.
- Make check or money order payable to: Utah Department of Public Safety.
- Please indicate your license or file number on the check or money order and mail to the above address.
- Based on this refusal, you will have an alcohol restriction placed on your driving privilege for a period of ten (10) years from the beginning date of the revocation. When an alcohol restriction has been placed on your driving privilege, you must not drive if you have any alcohol in your system.
- Pursuant to 41-6a-518.2, if your arrest date was on or after May 1, 2006, you are required to have an Ignition Interlock Device installed in any vehicle that you operate for a period of 3 years from the effective date of this notice. Operating a vehicle without an Ignition Interlock Device when you are an "Interlock Restricted Driver" is a violation of 41-6a-518.2 and may result in vehicle impoundment and additional Ignition Interlock Device restriction time.
- Apply for a new driver license or driving privilege card by taking the required tests and paying the fee.

Respectfully,

Nannette Rolfe, Director
Driver License Division

CC: